NO. 86049-1

SUPREME COURT OF THE STATE OF WASHINGTON

LOUIS ALEXANDER DIAZ and MONA DIAZ,

Petitioners,

v.

JAYANTHI KINI, M.D., and MEDICAL CENTER LABORATORY, INC., P.S.,

Respondents.

RESPONDENTS' ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'S AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondents

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

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I. IDENTITY OF ANSWERING PARTIES

Respondents Jayanthi Kini, M.D. and Medical Center Laboratory, Inc., P.S. ("MCL") submit this answer to the Amicus Curiae Memorandum in Support of Review filed by Washington State Association for Justice Foundation ("WSAJF").

II. ARGUMENT

WSAJF argues that this Court should grant the Diazes' petition for review based upon its assertions that the Court of Appeals' analysis of RCW 7.70.080 is "incomplete and flawed" in three respects.

First, WSAJF claims, *Amicus Memo. at 5*, that the Court of Appeals failed to fully address the Diazes' argument concerning the last sentence of RCW 7.70.080. Yet, the Court of Appeals did fully address the Diazes' argument and, based upon a manifestly correct interpretation of that sentence and the statute as a whole, rejected it. *Diaz v. State of Washington*, 161 Wn. App. 500, 506-07, 251 P.3d 249 (2011).

Second, WSAJF claims, *Amicus Memo. at 6-8*, that the Court of Appeals misinterpreted *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 864 P.2d 921 (1993), as supportive of its interpretation of RCW 7.70.080. Yet, even without its footnote, *Diaz*, 161 Wn. App. at 507 n.3, discussing the types of collateral sources at issue in *Adcox*, the Court of

Appeals' interpretation of RCW 7.70.080, based on the statute's unambiguous language, is plainly correct.

Third, WSAJF claims, *Amicus Memo. at 8-9*, that the Court of Appeals failed to consider the impact of RCW 4.22.070 in construing RCW 7.70.080. Yet, the parties in this case raised no arguments about RCW 4.22.070, and apportionment of fault was not an issue in the case, as the Court of Appeals recognized when noting in dicta that "[t]he rule in RCW 7.70.080 might play out differently under a case involving apportionment." *Diaz*, 161 Wn. App. at 507 n.2.

Contrary to WSAJF's assertions, the Court of Appeals' correct interpretation of the plain language of RCW 7.70.080 does not warrant review by this Court.

A. The Court of Appeals' Interpretation of the Last Sentence of RCW 7.70.080 Is Not Incomplete and Flawed. It Is Manifestly Correct.

RCW 7.70.080 provides:

> Any party may present evidence to the trier of fact that the plaintiff has already been compensated for the injury complained of from any source except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family. In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation. Compensation as used in this section shall mean payment of money or other property to or on behalf of the plaintiff, rendering of services to the plaintiff, or indemnification of expenses

> incurred by or on behalf of the plaintiff. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

The Court of Appeals plainly understood the Diazes' argument that the phrase "a defendant health care provider" as used in the last sentence of RCW 7.70.080 refers to any health care provider who is a defendant at the time the agreement to pay compensation is made. *See Diaz*, 161 Wn.App. at 506 (¶ 9). But, applying basic rules of statutory interpretation, *id.* at 506 (¶ 8), and looking to the entire statute and finding its meaning unambiguous, the Court of Appeals rejected the Diazes' argument, holding:

> We hold that the statute is unambiguous. The plain meaning of the phrase "defendant health care provider," in the context of the greater statutory provision, contemplates only those defendants who participate in trial. The provision limits its application to "any party." *RCW 7.70.080.* Former health care provider defendants who have settled with the plaintiff and paid damages have contributed to compensation of the plaintiff and are no longer defendants in the surviving action. Any remaining party may present evidence of that compensation.

Diaz, 161 Wn. App. at 507 (¶ 11). Thus, contrary to WSAJF's assertion, *Amicus Memo. at 5*, the Court of Appeals did explicitly address the Diazes' argument concerning the last sentence of RCW 7.70.080.

The Court of Appeals explicitly rejected that argument and correctly so. The last sentence of RCW 7.70.080 would make no sense if it were interpreted, as the Diazes have proposed, as limiting the ability to

"offer" settlement or other "collateral source" evidence to someone who is not a party (and thus not a "defendant") at the time of trial. Only parties may offer evidence at trial, and the last sentence is part of a statute that begins with the words "[a]ny party may present . . . ." RCW 7.70.080.

WSAJF's assertion that the Diazes' proposed interpretation "is at least worthy of discussion," *Amicus Memo. at 5*, falls short of a legitimate reason to grant review.

B. It Is Immaterial Whether the Court of Appeals Over-Interpreted *Adcox*, because RCW 7.70.080 Plainly Makes Evidence of Any Kind of "Compensation" from a Source other than the Plaintiff, the Plaintiff's Representative, or the Plaintiff's Immediate Family Admissible, Subject Only to the Plaintiff's Right to Show An Obligation to Repay.

WSAJF essentially asks the Court, *Amicus Memo at 6-8*, to grant review in order to correct the Court of Appeals' characterization of *Adcox*. That also is not a legitimate reason to review the Court of Appeals' decision affirming the judgment in favor of Dr. Kini and MCL entered after trial of the Diazes' claim. Even if the Court of Appeals overstated the holding or stated reasoning of *Adcox*, its interpretation of RCW 7.70.080 is plainly correct. The statute makes clear that "compensation" means "***payment of money*** or other property ***to*** or on behalf of ***the plaintiff***, rendering of services to the plaintiff free of charge to the plaintiff, or indemnification of expenses incurred by or on behalf of the

plaintiff." RCW 7.70.080 (emphases added). The statute just as plainly makes admissible compensation from "***any source*** except the assets of the plaintiff, the plaintiff's representative, or the plaintiff's immediate family." *Id.* (emphasis added). Because the settlement by the University of Washington and Dr. Futran consisted of money paid to the plaintiffs and did not come from any of the three excepted sources, it was admissible under the plain language of RCW 7.70.080, and irrespective of what collateral source evidence was or was not at issue in *Adcox*.

C. The Court of Appeals Did Not Need to Consider the "Impact" of RCW 4.22.070, and Its Decision Does Not Threaten any Confusion in that Regard.

It may (or may not) come to pass someday that an appeal will present an issue of whether a medical malpractice defendant may introduce settlement collateral source evidence under RCW 7.70.080 and also "empty chair" a settling former defendant. This is not that case. This case did not involve apportionment of fault under RCW 4.22.070, as the Court of Appeals recognized, *Diaz*, 161 Wn. App. at 507 n.2.[1] The Diazes have never raised any argument – in the trial court, in the Court of

[1] WSAJF complains, *Amicus Memo. at 8 n.8*, that the Court of Appeals' opinion "contains a passing reference to apportionment of liability, with a baffling citation to RCW 7.70.060, which has nothing to do with the subject." But, that the Court of Appeals mistakenly referenced RCW 7.70.060 instead of RCW 4.22.070, or chose not to issue an advisory opinion on how "[t]he rule in RCW 7.70.080 might play out differently under a case involving apportionment," which the case before it was not, is not a legitimate reason for this Court to grant review.

Appeals, or in their Petition for Review – about RCW 4.22.070, and Dr. Kini and MCL never sought both to introduce evidence under RCW 7.70.080 of the compensation the University and Dr. Futran paid in settlement and to apportion fault to them under RCW 4.22.070.

Nevertheless WSAJF argues, *Amicus Memo. at 8-9*, that this Court should accept review of the Court of Appeals' decision affirming the judgment entered in favor of Dr. Kini and MCL after trial of the Diazes' claims so that the question of how RCW 7.70.080 and RCW 4.22.070 interface "can be fully briefed and answered." The Court of Appeals correctly recognized that this case did not involve apportionment of fault, but noted that "[t]he rule in RCW 7.70.080 might play out differently under a case involving apportionment." *Diaz*, 161 Wn. App. at 507 n.2. Contrary to WSAJF's assertion, *Amicus Memo. at 9*, the Court of Appeals' decision is not "incomplete in the absence of consideration of how [RCW 7.70.080] and RCW 4.22.070 interface," an issue that was not before it. That WSAJF would like this Court to posit a hypothetical and issue an advisory opinion that could not affect the result in the Diazes' lawsuit is not a legitimate reason to grant the Diazes' petition for review. As this Court has previously made clear:

> "Although courts in some states do render advisory opinions, we do not do so in this jurisdiction." *Walker v. Munro*, 124 Wn.2d 402, 414, 879 P.2d 920 (1994) (citing

> *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938)). In other words, "this court will not render judgment on a hypothetical or speculative controversy." *Walker*, 124 Wn.2d at 415.

Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 157, 995 P.2d 33 (2000).[2]

III. CONCLUSION

For the foregoing reasons and those presented in the Answer to Petition for Review, Dr, Kini and MCL ask this Court to deny the Diazes' Petition for Review.

RESPECTFULLY SUBMITTED this 22nd day of August, 2011.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466

Attorneys for Respondents

[2] Moreover, "[a]n issue, theory or argument not presented at trial will not be considered on appeal." *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978); *Van Vonno v. Hertz Corp.*, 120 Wn.2d 416, 426-27, 841 P.2d 1244 (1993). And, arguments and issues raised only by an amicus need not be considered on review. *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988); *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984).

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 22nd day of August, 2011, I caused a true and correct copy of the foregoing document, "Respondents' Answer to Washington State Association for Justice Foundation Amicus Curiae Memorandum in Support of Review," to be delivered to the following counsel of record in the manner indicated below:

Counsel for Petitioners: Joseph A. Grube, WSBA #26476 RICCI GRUBE BRENEMAN, PLLC 1200 Fifth Ave., Suite 625 Seattle, WA 98101 Ph: (206) 770-7606 joe@rgbcounsel.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-file / E-mail
Co-Counsel for Respondents: Jeffrey R. Street, WSBA #17002 HODGKINSON STREET, LLC 1620 SW Taylor, Suite 350 Portland, OR 97205 Ph: (503) 222-1143 jrs@hs-legal.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-file / E-mail
Counsel for Amicus Curiae WSAJF: Bryan P. Harnetiaux, WSBA # 05169 ATTORNEY AT LAW 517 E 17th Ave Spokane WA 99203-2210 Ph: (509) 624-3890 rhomoki@winstoncashatt.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-file / E-mail
Counsel for Amicus Curiae WSAJF: George M Ahrend, WSBA # 25160 AHREND LAW FIRM PLLC 100 E Broadway Ave Moses Lake WA 98837-1740 Ph: (509) 764-9000 gahrend@ahrendlaw.com	SENT VIA: ☐ Fax ☐ ABC Legal Services ☐ Express Mail ☑ Regular U.S. Mail ☑ E-file / E-mail

DATED this 22nd day of August, 2011, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Custer, Carrie
Cc: Spillane, Mary; Ferm, Dan; joe@rgbcounsel.com; jrs@hs-legal.com; rhomoki@winstoncashatt.com; gahrend@ahrendlaw.com
Subject: RE: Diaz v. Kini, et al., Supreme Court #86049-1

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From: Custer, Carrie [mailto:CCuster@williamskastner.com]
Sent: Monday, August 22, 2011 11:20 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Spillane, Mary; Ferm, Dan; joe@rgbcounsel.com; jrs@hs-legal.com; rhomoki@winstoncashatt.com; gahrend@ahrendlaw.com
Subject: Diaz v. Kini, et al., Supreme Court #86049-1

Attached for filing in .pdf format is Respondents' Answer to Washington State Association for Justice Foundation's Amicus Curiae Memorandum in *Diaz v. Kini, et al.*, Supreme Court Cause No. 86049-1. The attorneys filing this answer are Mary Spillane, (206) 628-6656, WSBA No. 11981, e-mail address: mspillane@williamskastner.com and Dan Ferm, (206) 233-2908, WSBA No. 11466, e-mail address: dferm@williamskastner.com.

Respectfully submitted,

Carrie A. Custer
Legal Assistant to Mary H. Spillane, Daniel W. Ferm, and Jake Winfrey
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Main: 206.628.6600
Direct 206.628.2766
Fax: 206.628.6611
ccuster@williamskastner.com
www.williamskastner.com

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